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9 European Car Service and Zenon Smoczynski

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

12 KAREL SPIKES

13 Plaintiff

14 v.

15 EUROPEAN CAR SERVICE; ZENON
16 SMOCZYNSKI; ANDREW
17 MACIEJEWSKI; and DOES 1 through 10,
18 inclusive,

19 Defendants.

Case No.: 07CV2394LABWMC

REPLY TO PLAINTIFFS OPPOSITION
TO DEFENDANTS MOTION TO
DISMISS PURSUANT TO 12(B)(1)

Date: April 14, 2008
Judge: The Honorable Larry A. Burns

22 Defendants, ZENON SMOCZYNSKI and EUROPEAN CAR SERVICE, hereby submits
23 the following Reply to Plaintiffs Opposition to Defendant's Motion to Dismiss for Lack of
24 Standing and opposes Plaintiff's request for Summary Judgment in their favor. Plaintiff's
25 Motion to Dismiss is based upon this Reply as well as the Motion to Dismiss previously
26 submitted.
27
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I.

DEFENDANTS MOTION IS A FACIAL ATTACK AGAINST PLAINTIFF'S COMPLAINT AND A MOTION TO DISMISS IS APPROPRIATE

The underlying facts regarding the interaction between Plaintiff and Defendant on or about July 10, 2007 are not in dispute. In his declaration Plaintiff Spikes states,

At European Car Service, I called out a man who said he was the owner of the business and I told him my car was running rough. I asked if he could look at my car and give me an estimate, but he told me that he was too busy and refused to tell me when he would have some time to look at my car. (See Declaration of Karel Spikes Page 8, Section 25, lines 24-28).

Defendant Zenon Smoczynski describes the interaction as:

- 9) I have neither contracted with nor been paid by Karel Spikes.
 - 10) I have never provided Karel Spikes a written estimate.
 - 11) I was the only mechanic present at the property on July 10, 2007 and an individual that I now know to be Karel Spikes drove onto the property in a white Mercedes.
 - 12) He rolled down his window and asked me for a quote to service his car. I cannot recall what he requested to have repaired.
 - 13) I do not give anyone verbal quotes and refused to quote him a price
 - 14) Spikes then left European Car Service
 - 15) I have not seen Karel Spikes or his white Mercedes ever since.
- (See declaration of Zenon Smoczynski, Pages 1-2, lines 27-9)

The two men provide a nearly identical description of the same event. The material facts surrounding the alleged incident itself are not in dispute while the two parties disagree about their respective motives for the interaction. On the one hand, the Plaintiff contends that he was "shopping around" for repair quotes in order to have his "car tuned up" and that he "was unable to exit his vehicle" because of the alleged violations. (See Generally Declaration of Karel Spikes). Contrarily, the Defendant contends that the Plaintiff had no intention of having his car "tuned up" by the Defendant and was attempting to falsely manufacture standing to sue for the alleged ADA violations in order to extort a cash settlement.

1 Regardless of which parties explanation the court and/or jury were inclined to believe,
 2 the undisputed facts as alleged by either party do not establish standing to sue the Defendant
 3 under the American with Disabilities Act. Defendant's Rule 12(b)(1) motion to dismiss for lack
 4 of subject matter jurisdiction based upon Plaintiff's lack of standing is therefore appropriate.
 5 (See also Defendant's Motion to Dismiss, Page 6-7, Section 2(b), lines 19 – 15) Therefore,
 6 Defendant respectfully requests that the motion to dismiss be granted.
 7

8 II.

9 **THE PLAINTIFF DOES NOT HAVE STANDING TO SUE THE DEFENDANT BASED** 10 **UPON THE UNDISPUTED FACTS ALLEGED**

11
 12 In a factually similar ADA complaint, the Southern District federal court dismissed the
 13 Plaintiff's complaint for lack of subject matter jurisdiction. Wilson v Kayo Oil Company, 2007
 14 U.S. Dist. Lexis 79832 (S.D. Cal. Oct 25, 2007). In determining the standing question the court
 15 required that the Plaintiff show 1) an injury in fact; 2) traceable to the challenged action of the
 16 defendant; and 3) likely to be redressed by a favorable decision. Id at *4. The Wilson court's
 17 analysis was limited to the "injury in fact" element and applied a four-factor standing analysis to
 18 determine if an injury in fact had occurred. Id at *4.
 19

20 The four-factor standing test applied in this jurisdiction to an identical case consisted of:
 21 1) the proximity of the place of public accommodation to the plaintiff's residence; 2) the
 22 plaintiff's past patronage of defendant's business; 3) the definitiveness of plaintiff's plans to
 23 return; and 4) the plaintiff's frequency of travel near the accommodation in question. Id at *4.
 24 Moreover the proximity issue is irrelevant when adjudicating the defendant's motion to dismiss.
 25 Id at *4.
 26
 27
 28

1 In this case: 1) the plaintiff has no past patronage to the Defendant's business, 2) cannot
2 demonstrate plans to return to Defendant's business, and 3) has not alleged frequent travel to
3 Defendant's business (See Declaration of Karel Spikes). Accordingly, the Defendant requests
4 that Plaintiffs complaint be dismissed for lack of standing.
5

6 **III.**

7 **LIBERAL CONSTRUCTION AND TESTERS**

8 **Liberal Construction Does Not Include Hypothetical Injuries**

9
10 Plaintiff has alleged that standing is to be liberally construed in civil rights cases and
11 ignores the four-factor standing test described above claiming that Spikes suffered an injury in
12 fact the moment he became aware of the architectural barriers at European Car Service which
13 allegedly deterred his patronage.

14 Assuming arguendo, that Plaintiff's version of the "injury in fact" analysis were correct,
15 then Plaintiff has failed to show how Spikes' patronage of European Car Service was deterred by
16 the alleged "architectural barriers." Spikes claims to have beckoned Smoczynski over to his car
17 and complained to him that his car was "running rough." (See Declaration of Karel Spikes).
18 Smoczynski then told Spikes that he was too busy to work on his car and Spikes left without
19 incident. (See Declaration of Karel Spikes). Spikes has not alleged to have returned since and
20 Smoczynski has not seen him at European Car Service since July 10, 2007 (See Declaration of
21 Zenon Smoczynski).
22

23
24 Therefore, the fact that the Defendant was busy repairing his client's European
25 automobiles precluded him from servicing the Plaintiff's automobile and not the architectural
26 barriers as alleged. Had the Plaintiff exited his vehicle it would not have changed the fact that
27 the Defendant was unable to work on his automobile at that time. Moreover, the Plaintiff never
28

1 obtained a written estimate, was not given a verbal quote, no work was ever done on his car, and
2 he never returned to European Car Service.

3 Therefore, Plaintiff has failed to allege facts sufficient to find standing even under the
4 proposed "liberal analysis." At best, the Defendant's busy schedule inconvenienced the Plaintiff
5 by requiring that he visit another auto repair shop to have his car "tuned up." The Plaintiff was
6 then able to have his neighbor "tune up" his car for him. This is hardly the type of
7 "discrimination" the American with Disabilities Act is intended to redress. Defendant requests
8 that this court apply the four-factor analysis as described above and dismiss Plaintiff's complaint
9 for lack of standing.
10

11
12 Title III of the ADA Does Not Allow Testers

13 Plaintiff has alleged that: 1) because Title II of the ADA allows "testers" and 2) all titles
14 of the ADA are intended to prevent discrimination; therefore, Title III actions should similarly
15 allow "testers" as well. Had the legislature intended for the use of "testers" in Title III actions
16 then they would have said so in the plain language of Title III. However, the legislature did not
17 and the Defendant respectfully requests that this court not adopt such an extreme view.
18

19 Plaintiff is correct that Title III creates legal rights for "any person" with a disability.
20 However, these rights are created for "any person" with a disability who also "suffers
21 discrimination" at a place of public accommodation (Title III, American with Disabilities Act).
22 The undisputed facts show that Spikes has not suffered an injury in fact and likewise has not
23 been discriminated against by the Defendant. Moreover, Plaintiff has failed to cite a single case in
24 support of the theory that "testers" are allowed in Title III actions. The Defendant respectfully
25 requests that this court not grant Plaintiff's rights tantamount to a "private attorney general"
26 without any legal support for their unorthodox position.
27
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IV.

**TITLE III STANDING IS LIMITED TO CUSTOMERS, CLIENTS, AND/OR
LEGITIMATE FUTURE CUSTOMERS AND CLIENTS IN THIS CASE**

In a factually dissimilar ADA case the court held that the ADA Plaintiff need not have been a customer or client of the Defendant's restaurant to feel the sting of discrimination. Molski v M.J. Cable Inc, 481 F. 3d 724 (9th Cir. 2007). Interestingly enough, the Plaintiff in that case was a customer of the defendant's restaurant. Molski v M.J. Cable Inc, 481 F. 3d 724 (9th Cir. 2007).

In any event, the fact that the Plaintiff in this case was never a client or customer of Defendant's is *a* factor in determining whether or not he suffered an injury in fact under the Wilson test but is not *the* determining factor. Arguably, the facts that the Plaintiff never obtained a verbal quote, written estimate, or had repair work done by Defendant MAY not be enough to support Defendant's motion under the Molski standard without something more.

In this case, 1) the Plaintiff has also never returned to the Defendant's business, 2) has sued seven (7) auto repair facilities since December 2007, 3) is a serial litigant and has sued 149 establishments in this District since 2000, 4) is seeking a cash settlement when the ADA only entitles him to injunctive relief, 5) had the alleged repair work performed by "his neighbor" and has offered no corroborating proof 6) never bothered to call the Defendant, 7) has not specified what was wrong with his car, 8) sued for damages before requesting that Defendant repair the premises, and 9) *admits to traveling to another auto repair facility specifically because the Defendant was too busy to work on his car.* (See Declaration of Karel Spikes)

These facts, and others as discussed in Defendants Motion to Dismiss, show that the Plaintiff has NOT suffered an injury in fact under the four-factor standing analysis as described

1 in the Wilson case above. At best, they show he was inconvenienced by the Defendant's busy
2 scheduled.

3 Moreover, there is no history of past patronage, no attempted past patronage, and the
4 Defendant cannot reasonably claim that he intends to have his automobile fixed at the
5 Defendant's facility after suing six (6) other auto repair facilities since suing the Defendant for
6 the same violation. Most importantly, the Plaintiff admits to leaving the Defendant's facility
7 after he stated that he was "too busy" to work on his car and Plaintiff went to another car care
8 facility for a "tune up." Plaintiff was not precluded from obtaining defendants services based
9 upon architectural barriers, he was precluded by Defendant's busy schedule on July 10, 2007.
10 Plaintiff went to another facility, has not since returned to Defendant's shop, and had his
11 neighbor perform the tune up. There is no reasonable basis to conclude that the Plaintiff has
12 suffered an injury in fact. Therefore, Plaintiff's complaint must be dismissed for lack of
13 standing as it is facially inadequate under the circumstances.
14
15
16

17 CONCLUSION

18 Defendant has been soliciting bids for blue-stripping the area designated for the van
19 accessible handicapped parking space, installing a "built up curb ramp," and smoothing the
20 access aisle to the curb ramp pursuant to both Plaintiff's request and the CALDAG requirements
21 provided by Plaintiff. Nevertheless, Plaintiff is not satisfied with the Defendant's repair attempts
22 and insists on proceeding with litigation in order to recover monetary damages for the alleged
23 violations. Plaintiff supports their position with numerous exhibits and declarations of unrelated
24 and irrelevant letters that Plaintiff has drafted to Defendant's in other cases regarding the
25 necessity of monetary damages to ensure compliance with the ADA's requirements.
26
27
28

1 Be that as it may, Plaintiff's admits to visiting the premises and then leaving because the
2 Defendant was "too busy" to repair his car. At best, Plaintiff was inconvenienced by the
3 Defendant's busy schedule and was not denied access to anything based upon the alleged
4 architectural barriers.
5

6 WHERETOFORE, the Defendant requests that:

- 7 1) The 12(b)(1) motion to dismiss be granted,
8
9 2) The Plaintiff's request for summary judgment be denied,
10
11 3) That the Defendant be reimbursed for his attorneys fees and costs in an amount according
12 to proof, and
13
14 4) That Plaintiff Karel Spikes be classified as a vexatious litigant.
15

16
17 April 8, 2008

Respectfully Submitted,



Lawrence A. Mudgett III
Attorney for Defendants
EUROPEAN CAR SERVICE and
ZENON SMOCZYNSKI

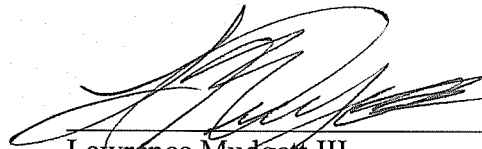
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CERTIFICATE OF SERVICE

7 I hereby certify that a copy of the foregoing motion was this date served upon all counsel of
8 record by placing a copy of the same in the United States Mail, postage prepaid, and sent to their
9 last known address as follows:

10 Ms. Amy Vandeveld
11 Law Offices of Amy B. Vandeveld
12 1850 Fifth Avenue, Suite 22
13 San Diego, CA 92101

14 San Diego, CA this Eighth day of April, 2008



15 Lawrence Mudgett III
16 Attorney for Defendant EUROPEAN CAR
17 SERVICE and ZENON SMOCZYNSKI
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PROOF OF SERVICE

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7 Attorney for KAREL SPIKES

8 IN THE UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 KAREL SPIKES,

11 Plaintiff,

12 vs.

13 EUROPEAN CAR SERVICE; ANDREW
14 MACIEJEWSKI; ZENNON SMOCYNSKI and
DOES 1 THROUGH 10, Inclusive,

15 Defendants.

Case No.: 07 CV 2394 LAB
(WMc)

**DECLARATION OF KAREL
SPIKES IN SUPPORT OF
PLAINTIFF'S OPPOSITION
TO DEFENDANTS' MOTION
TO DISMISS**

[FRCP 12(B)(1)]

Date: April 14, 2008
Time: 11:15 a.m.
Courtroom: 9
Judge: The Honorable Larry A.
Burns

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17
18
19 I, KAREL SPIKES, declare:

20
21 1. I am the Plaintiff in the instant action. I am a resident of the County of San
22 Diego, State of California and I have personal knowledge of the following facts. If called
23 as a witness, I could and would competently testify to the following:

24 2. I have at least three conditions which substantially impair my ability to
25 walk, stand, climb stairs and negotiate curbs: a) traumatic above-knee amputation of the
26 right lower extremity; b) chronic instability of the left knee due to knee dislocation; and c)
27 drop-foot due to permanent neurological injury at the left knee.

28 3. I was prescribed a wheelchair because I cannot walk without great difficulty

1 and pain, nor can I stand for more than fifteen to twenty minutes without great difficulty
2 and pain.

3 4. While I can walk, if wearing a prosthesis, my gait is severely imbalanced
4 and unsteady, due to my disabilities. These conditions also severely limit the distance I
5 am able to walk. Further, my disabilities make it difficult, if not impossible, for me to
6 negotiate curbs and/or stairs unless there are railings or other supportive features
7 available.

8 5. I suffer from "phantom pains" associated with my amputated extremity. I
9 have been treated for debilitating phantom pains.

10 6. I sued a number of businesses and property owners in the San Diego County
11 area, along with a few places outside of the San Diego County area, because of
12 architectural barriers that prevent people with mobility impairments, including myself,
13 from obtaining full and equal access to these places of public accommodation.

14 7. All of my cases that have resolved thus far, were resolved by way of
15 settlement. Before I will settle a case, I require the business and property owners to
16 remove architectural barriers. Attached hereto collectively as Exhibit "1" are copies of
17 pertinent pages of three non-confidential Settlement Agreements, which illustrate the
18 modifications I typically require of Defendants. There have been only a few instances in
19 which modifications were not presently required under the Settlement Agreement because
20 the business was no longer operational or the business was going to cease operations in
21 the near future. In those cases, I typically required that the business and property owners
22 agree to remove architectural barriers before the re-opening of the business, if that
23 occurred, or before another business opened for business at the particular site. For
24 example, I was advised during my lawsuit that Steve's Cabana Bar would likely close
25 after I filed my lawsuit. We still agreed, in the Settlement Agreement, that if the business
26 re-opened at the property, it would remove architectural barriers before re-opening.
27 During the lawsuit against 99 Cent Variety Store on University Avenue, the Defendant
28

1 represented that it intended to cease doing business in the near future. In our Settlement
2 Agreement, the Defendant agreed to make repairs to the interior of the facility if it
3 continued to operate at the property.

4 8. While I typically seek damages, fees and costs in my cases, I have never
5 settled a case for just money. In fact, in several cases I have waived my claims for
6 damages, fees and costs, or I have agreed to greatly reduced amounts for damages, fees
7 and costs so that the business owner could make our required modifications to their
8 facilities. Most of the Settlement Agreements I have entered into are confidential with
9 respect to the amount of money paid to me because, it is my understanding, this is a term
10 of settlement required by most defendants. Generally, however, I have settled almost
11 one-quarter of my cases for \$4,000.00 or less for damages, attorneys fees and costs. In
12 one-quarter of these cases, I settled for \$2,500.00 or less for damages, fees and costs. In
13 at least one case, I settled for costs only and in another, I waived all monetary claims so
14 that modifications could be made to the properties. In each of these cases, the Defendants
15 agreed to make substantial modifications to their properties to provide accessibility for
16 people with disabilities.

17 9. I believe that requiring defendants to pay money is an important tool to
18 compel compliance with access laws. If business and property owners think they can
19 delay complying with the ADA because there are no real consequences to them, they will
20 have no incentive to make modifications sooner rather than later. In every case, my
21 attorney and I endeavor to obtain agreements by business and property owners to perform
22 specific modifications by specific dates.

23 10. For each facility that I sued, at the time I filed each of the lawsuits, and
24 even after the lawsuits were settled, I intended to return to the facility either to compel
25 compliance with the ADA and/or to obtain the goods, services, benefits and privileges
26 provided by the business.

27 11. Not only do I fight for barrier removal, I make an effort to ensure that
28

1 barriers are actually removed. I frequently monitor the status of the facilities I sue during
2 the course of litigation and I routinely re-visit facilities following settlement of my cases
3 to ensure that modifications were properly performed. If, post-settlement, I find that a
4 business has not made the modifications that it had agreed to make, I notify my attorneys,
5 including Amy B. Vandeveld. It is my understanding that Ms. Vandeveld then contacts
6 the business' or property owners' attorneys to demand that they comply with the
7 Settlement Agreements' required modifications.

8 12. Most recently, about a week before the European Car Service Defendants
9 filed their Motion to Dismiss in this case, I re-visited Sundance Market to confirm
10 whether the modifications had been made that were required by our Settlement
11 Agreement. I found that the modifications were inappropriate and I took photographs for
12 my attorney, which I had printed on March 5, 2008, *two days before* the Defendants'
13 Motion to Dismiss was filed and served. Attached hereto as Exhibit "2" are true and
14 correct copies of the front and back of two photographs that I took at Sundance Market on
15 my recent visit, showing the print date-stamp on the back of the photographs.

16 13. To the best of my recollection, some of the facilities that I re-visited to
17 compel ADA compliance, that still had barriers after our settlement, were: Murphy's
18 Market, Corner Liquor, San Altos Liquor, Big K Market, Western Towing and Food
19 Center. I was represented by Mark Potter with respect to the Food Center matter. I
20 advised Mr. Potter that the Food Center had not complied with our Settlement Agreement
21 and it is my understanding that he contacted the defendants' attorney in that case since
22 accessibility modifications were later made to that store.

23 14. Further, despite my re-visits to ensure compliance, at least one business
24 continued to flout access laws and our Settlement Agreement. Murphy's Market
25 originally did not comply with our Agreement and did not install an accessible parking
26 space as was required. I understand that my attorney, Ms. Vandeveld, wrote a letter to
27 the defendant's attorney and an accessible parking space was installed, as required by the
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1 Agreement. The space was located across the parking lot from the entrance, away from
2 the building, and adjacent to the sidewalk, because the business owner wanted to be able
3 to utilize a side door that would have been blocked if the accessible parking space were
4 located next to the building. Two years later, in 2007, I again re-visited the facility, and
5 the business appeared to have moved the accessible parking space next to the building,
6 but the new space had no required access aisle. I took photographs, which I provided to
7 my attorney and it is my understanding that she wrote another letter to the defense
8 attorney. The current accessible parking space is now next to the building, with an access
9 aisle. It is not in the same location as originally installed, but it is closer to the entrance
10 and is acceptable to me. The original accessible parking space has been abandoned, the
11 signs have been removed and the striping allowed to fade. But for my re-visits and my
12 attorney's letters, the current space would have had no access aisle.

13 15. Given the fact that Murphy's originally complied with the Settlement
14 Agreement and then relocated the space a few years later without providing a required
15 access aisle, I have spent the last several months again re-visiting businesses to determine
16 if any have since failed to maintain the accessibility of their facilities. I have re-visited
17 virtually every facility, including the out-of-town motels, to check on the modifications.

18 16. With respect to my lawsuits against car repair and car sales facilities, I am a
19 car fanatic. I love cars. In the past ten years I have owned several different cars. Most of
20 them are older vehicles that have required regular maintenance and frequent repairs.
21 Since becoming disabled, I have owned a 1987 Maxima, 1984 300ZX, 1977 Cadillac
22 Seville, two 1978 Cadillac Seville (although not at the same time) and 1979 Cadillac
23 Seville and a late 1970's Chevy Chevette. I currently own a 1997 Ford Expedition (with
24 248,000 miles on it) and a 1992 Mercedes station wagon. My experience, having been a
25 longtime car owner and having been an automotive parts and sales technician, is that
26 smaller repair shops do not charge as much as dealerships. This is why I try to visit
27 smaller shops when looking for estimates and repairs for my vehicles. I have always
28

1 | been, and intend to continue to be, a comparison shopper. I look for the best service at
2 | the lowest cost. In fact, I visited another repair shop that specifically specializes in
3 | Mercedes Benz repairs around the time of my visit to European Car Service. The other
4 | facility had an accessible parking space, but it was blocked by repair vehicles, and I have
5 | not yet filed a lawsuit against it.

6 | 17. I initially visited the facilities listed in Defendants' Exhibit "7" for the
7 | purpose of obtaining information about repair services and parts and to get estimates for
8 | repairs. For example, I wanted to visit MD Auto Repair to compare prices for tires and
9 | rims for my SUV. I wanted to visit JD Collision Center because my Mercedes' spoiler
10 | was cracked and needed to be repaired and I wanted to determine if they perform that sort
11 | of work. I wanted to visit Precision Motors to get prices on tune-ups and oil changes for
12 | regular maintenance on my SUV. I have already monitored these facilities, after I filed
13 | the lawsuit, and I intend to return to each of these facilities in June of 2008. While I
14 | cannot disclose the terms of my Settlement Agreement with those business owners and
15 | property owners, I am hopeful that each of these facilities will be accessible to people
16 | with disabilities in June of 2008. All of the facilities are relatively close to my home in
17 | Spring Valley and are located in a commercial area that is like an "auto shop alley",
18 | where car owners can get multiple estimates from multiple repair and auto facilities. I
19 | intend to return to these facilities to ensure that they are accessible to people with
20 | disabilities so that I have the option of utilizing their services and purchasing their goods
21 | in the future.

22 | 18. TNT Auto Sales is an auto sales lot, which I visited in April of 2007. I am
23 | always interested in looking at, pricing and potentially purchasing other vehicles, as is
24 | evidenced by my car ownership history. I often go to automobile sales lots to see what is
25 | for sale, as well as to compare the prices of the inventory. I intend to re-visit TNT Auto
26 | Sales shortly after they complete the reconstruction of their facility and the pavement of
27 | their lot, which I understand will occur in the near future.

1 19. I visited the Auto Center to see if I could get an estimate for a tune-up on
2 my Mercedes. At that time, I was actually directed by an Auto Center employee to
3 another shop that specializes in Mercedes Benz cars. I intend to return to the Auto Center
4 to compel compliance with the ADA. Also, my SUV receives an oil change almost every
5 three months. I intend to re-visit the Auto Center, when it is accessible, to determine if
6 their prices are competitive and, if so, to get an oil change.

7 20. I went to Import Auto Body around the same time as my visits to JD
8 Collision, Precision Motors, MD Auto Repair and the Auto Center. As with JD Collision,
9 I hoped to get an estimate for the repair of my Mercedes Benz spoiler. I spoke with a
10 man of Asian descent who told me that he was not able to give me an estimate at that
11 time. He gave me a card and requested that I call for an appointment. I could not get out
12 of my car because there was no accessible parking space. I have not returned to the
13 facility since my first visit because it is not accessible. I intend to return to Import Auto
14 Body after I am advised that modifications have been made so that I can determine if the
15 facility has, in fact, complied with the ADA. I also want to customize the fender flares on
16 my Mercedes, so I would like to return to determine if they perform this sort of work and,
17 if so, the cost. If the cost is reasonable, I would like to have Import Auto Body perform
18 the work.

19 21. I want the same opportunities that non-disabled people have for car repairs.
20 I want to be able to shop around, get various estimates, and have my car fixed at a
21 reasonably priced, qualified facility. I do not have that opportunity if the car repair
22 facility or auto sales center does not even have an accessible parking space for my use. I
23 have returned to each of the facilities that I have sued that have not yet agreed to make
24 accessibility modifications to monitor their status. I also intend to return to each of the
25 facilities to compel compliance with the ADA.

26 22. With respect to the European Car Service business, I went to this repair
27 shop because I wanted to have my 1992 Mercedes Benz tuned up. The car was running
28

1 rough and I wanted to find a reasonably priced repair shop.

2 23. I actually went to European Car Service and two other facilities looking for
3 a tune up for my Mercedes. I went to European Car Service first to see if they could fix
4 my car and, if so, what the cost would be. I was not able to get an estimate for repairs, so
5 the next day, I went to the Auto Center. The Auto Center pointed me to another facility,
6 which I later visited. I knew that a neighbor of mine worked at the other facility, but I
7 never knew where the other facility was located. When I was directed to the other facility
8 by the Auto Center, I was able to talk with my neighbor about getting an estimate at that
9 other facility. The accessible space at the other facility was blocked by vehicles being
10 repaired and I could not park my car there. Also, they were busy and I was given a card
11 to call back to schedule an appointment. Ultimately, my Mercedes was repaired by my
12 neighbor who performed the work at my apartment parking space.

13 24. European Car Service had no accessible parking space, nor did the Auto
14 Center. The other facility had an accessible space but it was blocked by repair vehicles.
15 If I can park in an accessible spot, no one can park too close to me, so I can then open my
16 car door all the way. I need to fully open my door because of my drop foot and
17 prosthesis. Even at my apartment, I park my vehicles next to each other, and far enough
18 away from each other, so that I can open the Mercedes' door all the way. In fact, I back
19 my Mercedes into my parking space so that my driver's door is next to my other car. This
20 is evident in the photos included in Defendants' Exhibit "5" to their Motion. The vehicle
21 to the right of my Mercedes is an SUV that I also own. I back the SUV into its space so
22 that the driver's door is adjacent to the ramp located to the right of that second space.
23 That ramp leads to a level walkway that leads to my apartment.

24 25. At European Car Service, I called out to a man who said he was the owner
25 of the business and I told him my car was running rough. I asked if he could look at my
26 car and give me an estimate, but he told me that he was too busy and he refused to tell me
27 when he would have some time to look at my car. I have monitored the facility during the
28

1 course of this lawsuit and no modifications have been made as of March 5, 2008. At
2 European Car Service, I am not able to exit my vehicle or get into the office because of
3 the absence of an accessible parking space and a ramp.

4 26. When I filed my lawsuit against European Car Service, and even today, I
5 intended to return to the repair shop. First, I want to compel European Car Service to
6 remove architectural barriers, as required by the ADA. I want to be able to park my car in
7 an accessible spot and walk or roll into the office, like other non-disabled people. Since
8 my Mercedes is about 16 years old, it requires regular maintenance. I want to be able to
9 take it to low-cost repair shops that specialize in Mercedes vehicles. Ultimately I may
10 learn that European's repair costs are quite reasonable or I may learn that they are outside
11 of my budget, but I will never have that opportunity if I cannot even get out of my car at
12 the repair shop.

13 27. I am committed to making my world more accessible for me and for others
14 with disabilities. Not only do I file lawsuits when I find facilities are not accessible, but I
15 also follow up to ensure that barriers are removed. I have spent my own money on gas
16 and photographs re-visiting businesses after lawsuits were settled simply because
17 accessibility is important to me.

18 28. Attached hereto as Exhibit "3" are photographs of the parking lot and
19 walkway at European Car Service. These photos accurately depict the conditions that I
20 observed on July 10, 2007 during my first visit and on March 5, 2008 when I drove past
21 the facility to monitor its status. There was no ramp at the walkway and there were no
22 accessible parking spaces in the lot during either of my visits to the property.

23 I declare under penalty of perjury under the laws of the State of California and the
24 United States of America that the foregoing is true and correct.

25 Executed this 3-31 day of March, 2008 at San Diego, California.

26
27 
28 KAREL SPIKES

1 Lawrence Mudgett SBN 252898
2 Athanasios Preovolos SBN 182334
3 Preovolos & Associates, a Law Corporation
4 401 B Street, Suite 1520
5 San Diego, CA 92101
6 Telephone: 619-696-0520
7 Facsimile: 619-238-5344

8 Attorney for Defendants
9 Zenon Smoczynski and European Car Service

10 **DECLARATION OF ZENON SMOCZYNSKI**

11 I am ZENON SMOCZYNSKI, I have independent personal knowledge of the facts attested
12 herein and declare them to be true and correct under penalty of perjury. If called upon to do
13 so I could and would testify to the same.

- 14 1) I am the sole owner and operator of European Car Service, I am the only
15 mechanic, I have no employees, and have been in business since on or about
16 1992.
- 17 2) European Car Service is located at 8855 La Mesa Blvd in La Mesa, California
18 (hereinafter "the property") and I co-own the property with Andrew
19 Maciejewski.
- 20 3) I specialize in repairing European automobiles, I have no retail inventory, and
21 my clients do not frequently visit the property.
- 22 4) The property consists of an office, mechanics garage, surrounding area, and
23 a vacant lot.
- 24 5) My clients either contact me, their vehicles are towed to me, or they are
25 referred to me. I do not obtain clients by any other means.
- 26 6) I do not service my client's European cars unless I am contracted to do so
27 first.
- 28 7) My clients contract for services and then pay me upon completion.
- 8) Oftentimes, individuals first contact me seeking a written estimate for my
services.
- 9) I have neither contracted with nor been paid by Karel Spikes.

- 1 10) I have never provided Karel Spikes a written estimate.
- 2 11) I was the only mechanic present at the property on July 10, 2007 and an
- 3 individual that I now know to be Karel Spikes drove onto the property in a
- 4 white Mercedes.
- 5 12) Karel Spikes did not exit his vehicle.
- 6 13) He rolled down his window and asked me for a quote to service his car. I
- 7 cannot recall what he requested to have repaired.
- 8 14) I do not give anyone verbal quotes and refused to quote him a price.
- 9 15) Spikes then left European Car Service.
- 10 16) I have not seen Karel Spikes or his white Mercedes ever since.
- 11 17) I was not aware of his handicap as he did not exit his vehicle.
- 12 18) The entire incident lasted approximately one minute.
- 13 19) On or about March 5, 2008 my attorney Lawrence Mudgett showed me a
- 14 photograph of Karel Spikes and a Mercedes model 300TE station wagon with
- 15 disabled license plate number Y0628.
- 16 20) This was the first time I had seen Karel Spikes or that Mercedes wagon since
- 17 July 10, 2007.
- 18 21) I had no basis to conclude the individual in the photograph was Karel Spikes
- 19 or that the Mercedes wagon belonged to him but for my attorney's
- 20 representations.
- 21 22) Upon seeing the photograph I was able to recall the incident described in
- 22 sections 11- 18 above.
- 23 23) I was surprised that the individual in the incident above is the same man who
- 24 is suing me now since I never worked on his car, prepared a quote, or was
- 25 even aware of his handicap.
- 26 24) I have not serviced any Mercedes model 300TE wagons since the year 2000
- 27 and to the best of my knowledge, I cannot recall ever servicing any Mercedes
- 28 model 300TE wagon at any time.
- 25) On January 15, 2008 I was the only employee present at European Car
- Service.

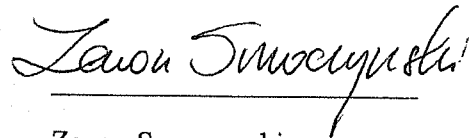
1 26) I was personally served with two copies of Plaintiff's complaint, one on
2 behalf of myself and one on behalf of European Car Service.

3 27) Andrew Maciejewski was not present at European Car Service on January 15,
4 2008 and could not have been personally served there.

5 28) Andrew left San Diego on or about June 2001 and I have not seen him since.

6 I declare under penalty of perjury under the laws of the State of California that the foregoing
7 is true and correct.

8
9 Dated: March 7, 2008



10 Zenon Smoczynski
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